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IN THE

Supreme Court of the United States

October Term, 1949
No. 415

JANE GRASSELLI BUZZI

vs.

CESARE PIETRO BUZZI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF

EDWARD E. PETRILLO,
202 Marine Bank Bldg.,
Erie, Pennsylvania,
HARVEY, RIMEL & JOHNSTON,
310 North Main St.,
Santa Ana, California,
Attorneys for Petitioner.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Frank Baumeister, Erie County Representative, Court House, Erie, Pa.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949
No. .....

Jane Grasselli Buzzi

vs.

Cesare Pietro Buzzi

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Cesare Pietro Buzzi, respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of the State of California entered in this case on July 18, 1949.

STATEMENT OF THE MATTER INVOLVED

Petitioner, Cesare Pietro Buzzi, and respondent, Jane Grasselli Buzzi, were married on May 9th, 1934, in Rome, Italy. At the time of marriage petitioner was and ever since has been and now is a citizen and subject

of Italy, but was at the time of said marriage in the consular services of the Italian Government to represent his country in the United States and, as such, was stationed in the City of Cleveland, Ohio, as consul general of Italy. At the time of said marriage respondent was a citizen and resident of the United States with her place of residence in the City of Cleveland and State of Ohio. After the marriage the parties returned to Cleveland, Ohio, where the petitioner was still stationed as a representative of his Government.

On or about October 30, 1935 the parties moved to Rome, Italy, petitioner having been recalled to Italy, but still remaining in the diplomatic and consular services of that Country.

During the first part of 1937, respondent left petitioner and returned to the United States and filed an action in divorce against the petitioner, who obtained a leave to come to the United States to defend the action and, this return visit resulted in a reconciliation between the petitioner and respondent, and said parties resumed their domicile in Rome, Italy.

During the month of August, 1939, respondent again left petitioner in Rome, Italy, and with the baby daughter returned to the United States. This was after Italy had become involved in the war in Europe and just prior to the breaking of the relations between Italy and the United States. Petitioner, by reason of his connection with the diplomatic services of his Country remained in Europe and never re-entered the United States until March of 1947.

On July 23, 1940, more than Six (6) years after the marriage, respondent filed an action for an annul-

ment of her marriage, in the City of Santa Ana, County of Orange and State of California, upon the alleged ground of fraud, to-wit: that petitioner had represented to respondent that he was a Count, and a member of the Italian nobility, when in fact he was not, and respondent, therefore, was defrauded in that all she got in the bargain was the man with whom she fell in love and consented to marry, but without title. When this action was filed petitioner was not a resident of nor domiciled in or physically present in California, but at all times was a citizen and resident of Italy, domiciled in and physically present on the Continent of Europe, and at no time was the petitioner ever in the United States between May, 1937 and March, 1947.

The Judgment Role of the Superior Court of Orange County, California, affirmatively shows upon its face that petitioner was a non-resident of California, and that there was never any personal service of process upon the petitioner in the State of California, and that the only service of process ever made on petitioner consisted of the publication of summons in a newspaper in Santa Ana, California, and the mailing by Registered Mail of a copy of the Summons and Complaint to Petitioner in Rome, Italy.

The Judgment Roll also shows affirmatively on its face that no general appearance in said action was ever made by petitioner while the proceedings were pending before said Court.

On the 28th day of February, 1941, the Superior Court of the County of Orange, California, granted a Judgment of Annulment of the marriage and further

ordered and decreed that respondent was to have the sole and exclusive custody and control of the minor child of the parties. This Judgment of Annulment was a default Judgment based upon the petitioner's failure to appear or answer to plaintiff's complaint.

During the pendency of the proceedings for annulment petitioner was absolutely unable to return to the United States to defend the action filed by his wife in the State of California for the reason that his Government did not permit him to leave Italy, and also for the reason that he had become a member of the Armistice Commission to prepare the terms of the Armistice between France and Italy. While Petitioner was in France on said mission he was seized by the Germans and interned in a prison camp first in Vittel, France, and then in Buchenwald, Germany, and was not able to return to Italy until May of 1942.

After the close of the war petitioner was finally able to arrange passage and passport to the United States and returned here in 1947.

On May 21, 1948, petitioner filed notice of motion to vacate the default Judgment of annulment and for an Order permitting him to file his proposed verified answer and to defend said annulment action upon its merits. In support of said motion petitioner also filed a memorandum of points and authorities, affidavit of facts excusing delay and laches, and other affidavits showing that extrinsic fraud had been practiced upon the Trial Court by respondent. Said motion to vacate first came before the Trial Court on July 2, 1948. Respondent objected to the Court considering the matter upon the ground that a final judgment had been enter-

ed; that more than one (1) year, in fact over seven (7) years had elapsed since the entry of the final judgment, and that the Trial Court no longer had jurisdiction to entertain the Motion to set aside the Judgment obtained by default. Respondent's objections were overruled. The Motion was heard, argued and finally submitted and on November 1, 1948, the Trial Court made its Order setting aside the defaulted Judgment of annulment and permitted the petitioner to file his answer so that the action could be heard and determined on its merits. The Trial Court ruled that the default judgment of annulment was void upon the face of the Judgment Roll for the reason that, as a matter of law, such action was not one in which jurisdiction over a non-resident, absent defendant, could be secured through substituted service, but was an action *in personam* where jurisdiction could be secured only by personal service within the territory of the Forum. From this Order respondent appealed to the District Court of Appeal, which Court reversed the Judgment of the Superior Court upon the ground that an action for annulment of marriage is a proceeding *in rem,* the same as an action in divorce, and there should be no distinction between the two as to the matter of securing jurisdiction over a non-resident, absent defendant, by service of publication.

On the 10th day of June, 1949, petitioner filed with the Supreme Court of the State of California his petition for review, but said petition was refused on the 18th day of July, 1949.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under Section 237 (b) and 240 (a) of the Judicial Code and the Rules of Practice and Procedure of the Supreme Court. This petition is filed within Ninety (90) days from the date of the entry of said Judgment in accordance with the rules.

QUESTIONS PRESENTED

1. Does service of process by publication give jurisdiction to render a valid decree of annulment of marriage against a non-resident, absent defendant, where the marriage ceremony was not celebrated in the state where the decree of annulment is granted, and where the matrimonial domicile never existed in that state?

2. Can a defendant come into court after a default judgment has been entered against him after the time for taking an appeal for said judgment has lapsed, when the said judgment is void on the face of the judgment roll for want of jurisdiction of the Court?

3. Was petitioner, who was a non-resident, absent defendant, deprived of due process of law in violation of the provisions of the 14th amendment of the constitution of the United States when the court granted an annulment of his marriage merely by service of

process by publication and by so doing deprived him of his property rights under the provisions of the community property laws of the State of California and of the Republic of Italy, besides depriving him of the control and custody of his own daughter?

4. Was any form of substituted service, other than personal service, binding upon the petitioner in an annulment case?

5. Did the trial court violate the provisions of the third article of the Constitution of the United States, as well as the Acts of Congress of the said United States, and the provisions of the treaties between the United States and Italy in granting an annulment upon the service by publication only, while petitioner was a member of the diplomatic and consular service of Italy at the time of such process?

REASONS FOR THE ALLOWANCES OF WRIT

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1. The questions presented involve specific rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental and the applicability of the provisions of the amendment to the Constitution with respect to the right of due process of law has been often stressed.

2. The questions presented involve also the right of persons in the diplomatic and consular services of their country to be served with process in accordance with the treaties in existence between nations and par-

ticularly between the countries of the parties involved in this litigation.

3. The decision in the present case is in conflict with and contrary to the decisions of a majority of the Courts of the United States.

CONCLUSION

Your petitioner verily believes that this petition presents a case cognizable by this Honorable Court in order to secure uniformity of decisions on the question of service or process in annulment cases among the Courts of the several States of the Union, and under the Constitution and Statutes of the United States and the rules of this Honorable Court.

Wherefore, comes your petitioner, and respectfully prays that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California commanding that Court to certify and to send to this Court for its review a full and complete transcription of the Record and all proceedings in said suit, being the case, 4th Civil No. 3887, and entitled: "Jane Grasselli Buzzi, Plaintiff and Appellant, and Cesare Pietro Buzzi, Defendant and Respondent", and that the Judgment of the said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

CESARE PIETRO BUZZI,
By EDWARD E. PETRILLO,
HARVEY, RIMEL & JOHNSTON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

There are five (5) questions submitted in this Petition, two of which involve violations of the provisions of the Constitution of the United States.

POINT ONE:

Does Service of Process by Publication Give Jurisdiction To Render a Valid Decree of Annulment of Marriage Against a Non-Resident, Absent Defendant where the Marriage Ceremony Was Not Celebrated in the State where the Decree of Annulment Is Granted, and where the Matrimonial Domicile Never Existed in that State?

The Action at bar is not governed by the decisions of this Honorable Court in the recent cases of *Estin vs. Estin* (334 U. S. 541) and *Kreiger vs. Kreiger* (334 U. S. 555) for the reason that our present case does not involve an action in divorce, but an action to annul an existing marriage.

Historically, equity acted only in personam. (42 *Am. Jur.* page 73). Of course the statutes have changed the nature of equity actions in some particulars;

but aside from such changes the statement is still true. Annulment is a child of Equity.

> *Nelson on Divorce and Annulment* (1945, William T. Nelson, Vol. 2, p. 705.)

Because of the differences between divorce and annulment, many writers have contended that annulment actions should be brought only in the jurisdiction where the marriage was celebrated. Indeed there is dictum in an opinion of the California Supreme Court to that effect.

> "Since the validity of marriage is generally determined by the law of the State where the marriage took place, there are cogent reasons why annulments should be sought in the tribunals of that State."
>
> *Mayer v. Mayer* (1929), 207 Cal. 685 at 696.

It does not appear that this doctrine has been generally applied as a rule in conflicts of law; but it does point up to the seriousness of a court's applying the rules of law from another jurisdiction in annulling a marriage.

> "It may readily be conceded that a court should not annul a marriage on the ground of fraud except in extreme cases, where the particular fraud goes to the very essence of the marriage relation, and especially is this true where the marriage has been fully consummated and the parties have actually assumed all the mutual rights and duties of the relation. In such a case, considerations of public policy intervene and courts are loath to annul a marriage."
>
> *Millar v. Millar* (1917), 175 Cal. 797 at 803.

Service of summons by publication in an action to annul a marriage is contrary to the statutes of the State of California.

Service by publication is purely statutory in origin, and service under such statutes must be in conformity thereto (*Nelson on Divorce and Annulment*. Vol. 2, p. 707). Such statutes must be followed strictly: (id., Vol. 2, p. 721.)

> "* * * the courts are practically unanimous in holding that such jurisdiction (i.e., where the defendant in an annulment is domiciled outside the territorial jurisdiction of the Court where the action is brought) may not be exercised under a constructive service of process upon the non-resident defendant by publication or personally without the state."
>
> 128 *A. L. R.* 61, at 73.
>
> "Although the jurisdiction of the courts of the domicil of one of the parties to render a decree of annulment of marriage celebrated elsewhere is generally recognized, the view has been taken that in the absence of statute, such jurisdiction may not be exercised under a constructive service of process upon the non-resident defendant by publication or personally without the State. Furthermore, although there is authority to the contrary, it has been held that this is true, notwithstanding a statute expressly authorized constructive service by publication in divorce cases."
>
> 35 *Am. Jur.* pp. 229, 230.

In an annotation entitled "Jurisdiction as between different states, of a suit to Annul Marriage" found in Volume 128 *A. L. R.* 61, the writer says on page 73 under the title "Constructive Service on Non-resident Defendant":

> "* * * the courts are practically unanimous in holding that such jurisdiction (i.e., where one party is domiciled in a state other than that of celebration of marriage) may not be exercised under a constructive service by process upon the non-resident defendant by publication or personally without the State."

The writer further states that the defendant's personal presence within the state of the forum and personal service of the summons therein or a voluntary general appearance are absolutely necessary, and the writer discusses many cases from many jurisdictions.

Again the editor of *American Jurisprudence* in Volume 35, pages 229 and 230 under Section 75, on the subject of marriage, states that the general rule throughout the United States, to which there are very few exceptions, is that in actions for annulment of marriage, the Court cannot obtain jurisdiction over a non-resident defendant by substituted service.

In a suit between two towns relative to the support of a pauper, Massachusetts refused to recognize a decree for annulment in the New York Courts based on service on the defendant in Massachusetts.

> *Cummington v. Belchertown* (1889), 21 N. E. 435 Mass.

In *Pepper v. Shearer* (1897), 26 S.E. 797 (S. Car.), the defendant at all times during the action was a resident of Texas. On Plaintiff's action to annul the marriage, defendant made a special appearance and defeated the action although plaintiff had made good substituted service according to South Carolina Law. The Supreme Court, in affirming, pointed out that the defendant at all times during the action was a resident of Texas, and that an action to annul that contract is in personam, and that, therefore, jurisdiction cannot be acquired by the court over the person of the defendant through substituted service.

In *Berlinsky vs. Berlinsky* (1923), 198 N.Y.S. 402 (New York Supreme Court, Appellate Division) defendant appealed from orders denying his motions to vacate an order for publication of summons and to dismiss the complaint for lack of jurisdiction over the defendant. The decision of the lower court was reversed. At the beginning of the action, defendant was a resident of Maryland. The appellate court pointed out that the power of a court to declare a marriage void is controlled by statute, and that in the absence of statutory authority a court cannot decree an annulment without personal service on the defendant within the state, or his voluntary appearance. Thus, although the court in that case was able to make its decision on statutory grounds, the statement is made that the annulment action was one in personam (198 N.Y.S. at 406).

The most recent case found dealing with this point is *Gayle v. Gayle* (1946), 192 S. W. (2d) 821 (Kentucky Court of Appeals). In the annulment action in which the defendant was a non-resident of the State of Ken-

tucky, plaintiff proceeded by constructive service. The complaint was dismissed, and the Court of Appeals affirmed the holding of the lower court. Logically, the court points out the difference between divorce and annulment. Divorce may be held to be in rem because the marriage status is the thing the court acts on. In annulment, however, the allegations of the petition preclude the existence of the thing or res. If the court should find for the plaintiff, it in effect finds that it had no jurisdiction to act (192 8W (2) at 822). Thus an annulment action is one for a personal judgment.

The Indiana Courts have followed the same line of reasoning:

Plaintiff brought an action to annul his marriage in the Indiana Courts, and served defendant in Alabama by publication. Defendant's motion to quash was overruled, and plaintiff given judgment. The Supreme Court reversed this ruling on the grounds that, although the statute provided for proceedings in annulment as in divorces, there was no specific reference in that section to cases like the one under consideration (*Shafe v. Shafe* (1935), 198 N.E. 826).

That the California legislature regarded annulment actions as in personam is evident from a reading of Section 86 of the Civil Code, and comparing that section with the definition of an action in rem:

> "*Effect of judgment of nullity.* A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them."
>
> *Civil Code,* Sec. 86.

That divorce is regarded differently is evident from a reading of Section 96 of the Civil Code:

> "Effect of Divorce. The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons".

And marriage is defined thus:

> "What constitutes marriage. Marriage is personal relation arising out of civil contract, to which contract is necessary * * *"
>
> *Civil Code,* Section 55.

It appears that under the Civil Code of California there are no provisions setting forth the procedure for service in any action brought for annulment of marriage, although the code specifically provides how service should be made in actions of divorce.

The majority of the courts of the several states of the United States have held that, in the absence of a specific statutory authorization for service of process by publication on a non-resident in annulment actions, there can be no valid service on a non-resident who does not submit himself to the jurisdiction of the court.

POINT TWO:

Can a Defendant Come into Court, After a Default Judgment Has Been Entered Against Him and After the Time for Taking an Appeal for Said Judgment Has Lapsed, when the Said Judgment Is Void on the Face of the Judgment Roll for Want of Jurisdiction of the Court?

It is obvious that if a judgment is void on its face, the same may be set aside at any time. In the first place a court cannot render a valid judgment when it has no jurisdiction over the person of the defendant, and if the judgment is rendered against him by default, such judgment is void.

The provision of Article 4, Section 1, of the Constitution of the United States that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State is not applicable where the judgment is rendered by the Court of a State which has no jurisdiction over the parties. If a State has no jurisdiction over the defendant, a personal judgment rendered against him by a Court of that State is void, and being void it could be set aside at any time. The mere fact that the defendant had actual knowledge of the action is not sufficient to make the judgment valid.

POINT THREE:

Was Petitioner, Who Was a Non-Resident, Absent Defendant, Deprived of Due Process of Law in Violation of the Provisions of the 14th Amendment of the Constitution of the United States when the Court Granted an Annulment of His Marriage Merely by Service of Process by Publication and by so Doing Deprived Him of His Property Rights under the Provisions of the Community Property Laws of the State of California and of the Republic of Italy, besides Depriving Him of the Control and Custody of His Own Daughter?

The Fourteenth Amendment to the Constitution of the United States provides in part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

Article I, Section 13 of the Constitution of the State of California provides in part: "No person shall * * * be deprived of life, liberty, or property without due process of law * * *"

"Due Process" means that jurisdiction to render a personal judgment against a non-resident must be obtained by personal service of process on the defendant within the territorial jurisdiction of the State of the forum.

Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. Ed. 565;

Smith v. The Supreme Lodge Ancient Order of the United Workman (1909), 12 Cal. App. 189.

The following statements from American Jurisprudence clarify the application of this rule:

> "* * * Whether a proceeding is in rem or in personam is determined by its nature and purpose and by these only. A proceeding in personam is a proceeding to enforce personal rights, and obligations brought against the person and based on jurisdiction of the person, although it may involve his right to, or the exercise of, specific property, or seek to compel him to control or dispose of it in accordance with the mandate of the court. In a proceeding in personam the court acts upon its jurisdiction over the person. In fact, the chief value of the distinction between actions in this respect is in the determination of the sufficiency of the service of process on the defendant."
>
> 1 *Am. Jur.* (*Actions*), Sec. 47, p. 435.

The Superior Court of Orange County ruled that an action to annul a marriage is an action in personam, but the District Court of Appeal has ruled that it should be considered as being one *in rem,* which decision appears to be in contradiction with the majority of the decisions of the Courts of the United States.

We respectfully submit that an action of annulment of marriage cannot be ruled as being an action in rem for the reason that an annulment destroys all property rights acquired by the aggrieved party through marriage, while a divorce does not so act for the reason that the divorce action does not affect the rights of the individuals, but only their status. Here, in this case, petitioner, as a matter of law, would be

barred from any rights under the community property laws of the State of California where the action of annulment was instituted as well as under the laws of the Kingdom, now Republic, of Italy, where the marriage had taken place. If, therefore, the annulment action deprived petitioner of any property rights, then, without any doubt, the action would be an action in personam and not in rem, and the petitioner would be deprived of property without due process of law in violation of the provisions of the 14th Amendment to the Constitution of the United States.

POINT FOUR:

Was any Form of Substituted Service, other than Personal Service, Binding upon the Petitioner in an Annulment Case?

If the action for annulment of marriage is an action in personam, then it will be useless to discuss the matter further, as it is the general law that any form of substituted service in an action in personam is not binding upon an absent defendant.

The purpose and nature of an action for divorce is to terminate an existing valid status by reason of conduct occurring after the creation of this status. The validity of the marriage and the existence of this status are presupposed and considered by the Court and the law, and may not be questioned. An action for annulment, on the other hand, has a totally different purpose. Annulment is a judicial declaration that no valid mar-

riage ever existed and hence that no matrimonial status ever existed. This declaration is based upon something which happened or existed at or before the marriage ceremony and which rendered the ceremony either void or voidable.

With the exception of the decision of the Superior Court of Appeal of the State of California, and one decision from the Courts of the State of Washington, all the rest of the Courts throughout the United States and Canada, which have passed upon the question, have arrived at the same conclusion, namely: that in the absence of a specific statute authorizing service by publication an action for annulment of marriage is one which is so much in personam, so personal in nature, so much in the nature of an action ex contractu, that personal service upon a non-resident, absent defendant, within the State of the forum, or a general appearance, is an absolute necessity to jurisdiction, and that any judgment based solely on service by publication is completely void. The code of Civil Practice of the State of California does not contain any provision for service relating to actions for annulment of marriage.

The most recent decision outside the State of California is the case of *Gayle vs. Gayle* (301 Ky. 821, 192 S. W. 2nd 821) to which reference has already been made. This case is squarely in point on the facts. The decision is short, concise, and presents the most logical and consistent statement of the law which we have been able to find. After first pointing out that an action in rem, or quasi-in-rem, calls for a judgment upon the status of the subject matter and is binding on the whole

world, while an action in personam calls for a judgment which binds only the parties to the action and their privies, the Court then states:

"In the case of divorce, the marriage status is the thing or res upon which the Court may act. In an action for annulment on the ground the marriage ceremony was void, the very allegations of the petition preclude the existence of the thing or res, in 128 A.L.R. page 63, it is said:

"Moreover, it seems absurd to speak of that state as having created the res of the status, when the very issue in the annulment suit is whether a status was created. The premises of the doctrine which assumes that a status was created by the locus celebrationis, on which the claim for exclusive jurisdiction rests, seems fallacious, because that question will only be determined by the very litigation in which the jurisdiction is assumed, and jurisdiction may be predicated on an issue yet undetermined in the very litigation in which its existence is invoked. If the Court should find that the ceremony effected a valid marriage, while the jurisdictional requirement that the locus celebrationis must have created a res or a status is satisfied by retroactive operation of the court's finding, the purpose of the annulment suit is thereby defeated; but if the court decides that a ceremony did not effect a valid marriage, such a decision is an implied admission by the court that it acted without jurisdiction to begin with. Thus the court's own decision is an implied repudiation of its jurisdiction to entertain the suit. Such is not the situation

in divorce cases which presuppose that a status was validly created and was in existence at the commencement of the divorce suit.

"Since, as we have seen, this is an action for a personal judgment, and the defendant personally has neither been served within the territorial limits of the Court, nor entered his appearance, the chancellor correctly refused to entertain the action."

It must be borne in mind that our present petitioner during the entire proceedings for the annulment of his marriage was outside the limits of the territory of the United States; that the decision of the Circuit Court of Appeal of the State of California was based upon expediency and public policy, but not on the law governing a case of this type. During the proceeding, petitioner was separated from the Court where the proceedings were taking place by Seven thousand five-hundred (7,500) miles of land and ocean, and was unable to leave Italy because of his official duties towards his Country and the unsettled and precarious conditions existing in Europe at that time.

POINT FIVE:

Did the Trial Court Violate the Provisions of the Third Article of the Constitution of The United States, as well as the Acts of Congress of the Said United States, and the Provisions of the Treaties between the United States and Italy, in Granting an Annulment upon the Service by Publication Only, while Petitioner Was a Member of the Diplomatic and Consular Service of Italy at the Time of Such Process?

The second section of the Third Article of the Constitution of the United States declares that "in all cases affecting Ambassadors, other public ministers and Consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction". The constitutional grant of original jurisdiction to the Supreme Court of all cases affecting consuls did not prevent Congress from conferring original jurisdiction in such cases on the subordinate courts of the Union.

Bors vs. Preston (111 U. S. 252).

The Act of Congress referred to in the above decision appears to be the act passed on the 24th day of September, 1789, giving jurisdiction to the District Court of the United States, in several cases against consuls and vice-consuls (1 Stat. 76). This Act of Congress was cited in the case of *State of Texas vs. Lewis* (14 Fed. 67), as well as the *Bors vs. Preston* case above referred to.

In an opinion of the Attorney General of the United States (1 Op. Atty. Gen. 406) it was stated by him as follows:

"Consuls are bound to appear only in the Federal Courts; the Constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the state courts, in which they shall answer".

It also was held that the privilege of bringing suits in the State Courts is not denied foreign consuls, but that no action may be instituted in the State Courts against consuls for the reason that state courts have no jurisdiction to entertain any suits against them.

Sagory vs. Wissman (Fed. Cases No. 12, 217).

In the case of *Griffin vs. Dominguez* (9 N. Y. Sup. Court 656) it was held that it is the duty of the state court, whenever it appears that a foreign consul is defendant, in whatever stage of the proceedings, to confess at once want of jurisdiction and declare its former proceedings void.

In our present case, petitioner, during the time that he had been in the United States, was at all times in the consular services of his country, and that the last place wherein he exercised his official duties was the City of Cleveland, Ohio where he held the position of Consul General of Italy. He held an exequator which was granted to him by the President of the United States in recognition of his official status and when Petitioner was recalled to Italy he remained in the consular and diplomatic service, and was active in the Foreign Office at Rome, Italy. His status was brought to the attention of the Superior Court of Orange County, California, where the annulment proceedings were instituted, through a sworn affidavit of Mrs. Buzzi

which appears on the Judgment Roll earmarked as No. 38593 and which reads as follows:

> "Jane Grasselli Buzzi, being first duly sworn, deposes and says:
>
> That Cesare Pietro Buzzi, defendant in the above entitled action, resides at Rome, Italy; that his place of employment is at Rome, Italy; *his business is that of Consular Service,* and that he is not now in the Military Service of the United States of America."
>
> (See transcribed notes of the Record).

Notice of the fact that the petitioner was in the diplomatic services of Italy appears again on the Judgment Roll of said Court at Number 38593 (See the transcribed notes of the Record): "the last known place of residence of the defendant Cesare Pietro Buzzi, to wit: Sig. Cesare Pietro Buzzi, *Ministero Degli Affari Esteri, Palazzo Chigi, Rome, Italy.*"

The address itself indicated that he was then on duty with the office of the Secretary of Foreign Affairs in Palazzo Chigi, Rome, Italy, which at that time was well known in diplomatic circles and was generally publicized as the official headquarters of the Italian Foreign Office.

It might be argued that matrimonial actions were not contemplated either by the makers of the Constitution or by the legislators, and that there are cases where certain actions were brought in domestic relations courts against consuls on questions of support and separation, but in all these cases it appears that both the husband and the wife were residing in the City and

in the State where the actions were instituted and that, under those circumstances, the Court would have jurisdiction to determine the issue and render a valid judgment (*Urdaneta vs. Urdaneta,* 37 NYS 2nd 601, 179 Mis. 95). However, in the case of *Higginson vs. Higginson,* (158 NYS 92, 96 Misc. reports 457), the Court held that:

> "under the Constitution of the United States, Article 3, Paragraph 2, Subsection 1, 2; Article 3, Paragraph 1, and Article 6, subsection 2, to have no jurisdiction of wife's action for separation, under Code Civ. Proc. N. Y. Paragraph 1762, as against husband, consul for republic of Peru, so that service of summons would be vacated and complaint dismissed".

It must be borne in mind that petitioner in our case was at no time living in the United States when the proceedings were instituted for the annulment of his marriage and, moreover, was unable to appear because of his official position with his Government which facts were well known to his wife, the complainant in the case. The action was instituted and prosecuted in a State Court improperly, because such Court had no jurisdiction over the person of the petitioner and constitutionally could not assume jurisdiction since petitioner was in the consular and diplomatic services of Italy at that time, which fact was established by the wife's own pleadings and the affidavits of service filed in this case.

It is respectfully submitted, therefore, that the rendering of the judgment against petitioner was a violation of the provisions of the Constitution of the

United States and of the Act of Congress which conferred jurisdiction only to the Federal Courts of the United States in all actions against diplomats and consuls.

CONCLUSION

It is further respectfully submitted that the issues involved in this case are of such a fundamental and unusual nature that they call for the exercise by this Court of its supervisory power, and the granting of the requested Writ of Certiorari for the purpose of reviewing the judgment of the Supreme Court of the State of California and for the rendition of such judgment as justice may require.

Respectfully submitted,
EDWARD E. PETRILLO,
Attorney for Petitioner.
HARVEY, RIMEL AND JOHNSTON,
Of Counsel.

ASSIGNMENT OF ERROR

The Supreme Court of the State of California erred in dismissing the petition of Cesare Pietro Buzzi, appellant, and in sustaining the decision of the Superior Court of Appeal, 4th Appellate District, which Court reversed the judgment of the Superior Court of the County of Orange in setting aside the decree of annulment entered by default on February 28, 1941.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 415

JANE GRASSELLI BUZZI,

Respondent,

vs.

CESARE PIETRO BUZZI,

Petitioner.

Respondent's Brief in Opposition to Granting of Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner served upon the respondent copies of his petition for writ of certiorari but has not served upon respondent any copy of the printed record as required by Rule 38 of the United States Supreme Court Rules, and for that reason respondent is unable to cite folio numbers to portions of the record to which she refers. In petitioner's statement of the matter involved he has failed to advise the court of one very important portion of the record, namely, that before any default of petitioner was entered in the Superior Court of the State of California in and for the County of Orange, on the 28th day of February, 1941, but after petitioner had been served by

registered mail with a copy of the summons and complaint in said action, that petitioner, who is the defendant in the court below, through attorneys duly licensed to practice in all the courts of the state, filed a special appearance and motion to quash service of summons, together with written points and authorities in support thereof. This special appearance was filed in the Superior Court on February 10, 1941. The matter was fully argued on the 14th day of February, 1941, at which time it was denied by the court, the minute order being as follows:

> "In the Superior Court State of California County of Orange Dept. 1. In Open Court at 10:00 A. M. February 14, 1941. Present Hon. G. K. Scovel, Judge, Sheriff and Clerk.
>
> 38592 Buzzi v. Buzzi.
>
> Motion to quash summons.
>
> Motion denied. Defendant allowed 10 days to file appearance. Stay granted pending this period."

No further appearance was made or action taken by the defendant and thereafter default was entered, evidence taken, findings made and a decree of annulment entered. No appeal on matters of law alone was taken from the judgment which petitioner could have done without subjecting himself generally to the jurisdiction of the court.

Neither at the time of the special appearance to quash service of summons nor at the time of his motion to set aside the default or in the District Court of Appeal of the State of California, has petitioner ever claimed lack of jurisdiction of said court by reason of his being in the diplomatic or consular service of his country, and the first time this claim has been made in any court in which this matter has or will be considered is in his petition for writ of certiorari to this Honorable Court.

ARGUMENT.

POINT A.

Can a Defendant Who Has Specially Appeared Before a California Superior Court and Unsuccessfully Moved to Quash Service of Summons and Has Not Appealed From That Order and Judgment Has Been Entered Against Him by Reason of Default, Come Into Court Seven Years Later and Move to Set Aside the Default?

(1) A court has initial power to determine its own jurisdiction. In this action the order denying the motion to quash service of summons was made after a full hearing and submission. No appeal was taken from the judgment on matters of law only.

(2) In California an appeal may be taken on questions of law alone where a person specially appeared for the single purpose of objecting to the jurisdiction of the court over him as a party defendant and where his appeal is confined to that one question.

Roehl v. The Texas Co., 107 Cal. App. 691 (rehearing denied);

Clark v. Forbes, 34 Cal. App. 524;

Line v. Line, 75 Cal. App. 2d 723, 728;

Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 662;

Crackel v. Crackel, 17 Cal. App. 600.

(3) The question of jurisdiction of the Superior Court of the State of California, in and for the County of Orange, over the subject matter of the action and the person of the petitioner having been fully argued at the time of the hearing on the motion to quash, is final and con-

clusive as to the petitioner and not thereafter open to further attack. This case is very similar to the case decided by the Supreme Court in *Floy P. Baldwin v. Iowa State Traveling Men's Association, a corporation,* 283 U. S. 522-527, 75 L. Ed. 1244.

In that case a corporation proceeded specially in the U. S. District Court of Missouri to quash service of summons. After a hearing on affidavits and briefs the motion was overruled with leave to plead within thirty days. No plea was filed within that period, the cause proceeded and judgment was entered in the amount claimed. Thereafter a writ of certiorari was granted in the Supreme Court of the United States, seeking to void the judgment. The Supreme Court said:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. *Thomas v. Whitman,* 18 Wall. 457, 21 L. ed. 897; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565; *Hart v. Sansom,* 110 U. S. 151, 28 L. ed. 101, 3 S. Ct. 596; *Wetmore v. Karrick,* 205 U. S. 141, 51 L. ed. 745, 27 S. Ct. 434; *Bigelow v. Old Dominion Copper Min. & Smelting Co.,* 225 U. S. 111, 56 L. ed. 1009, 32 S. Ct. 641, Ann. Cas. 1913E, 875; *McDonald v. Mabee,* 243 U. S. 90, 61 L. ed. 608, L. R. A. 1917F, 458, 37 S. Ct. 343. It also had

the right to appeal from the decision of the Missouri district court, as is shown by *Harkness v. Hyde,* 98 U. S. 476, 25 L. ed. 237, *supra,* and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Floy P. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522-527, 75 L. Ed. 1244.

It is interesting to note that the Supreme Court of California has approved this principle. In *Estate of Estrem,* 16 Cal. 2d 563, 570, the court said:

". . . the increasing tendency is to treat a finding by the original court of jurisdictional facts, whether as to person or subject matter, binding upon the court in which suit on the judgment is brought, when the question was originally duly litigated with proper notice and participation of all the parties affected by it. (*Baldwin v. Iowa State Traveling Men's Assn.,* 283 U. S. 522 (51 Sup. Ct. 517, 75 L. ed. 1244); . . ."

POINT B.

Petition for Writ of Certiorari Is Directed to the Wrong Court.

We respectfully call attention to the fact that petitioner requests the writ to be issued to the Supreme Court of the State of California to review its judgment entered in this case on July 18, 1949. The Supreme Court of California rendered no judgment or opinion in this case. The District Court of Appeal rendered its decision and opinion in this case on May 13, 1949. On July 7, 1949, the Supreme Court of California denied a hearing without opinion in the case. There was no order, judgment or decision by the Supreme Court of California on July 18, 1949, and the only order of the Supreme Court was on July 7, 1949, "Hearing denied." Inasmuch as the Supreme Court of California declined to hear the case after a unanimous decision of the District Court of Appeal of the State of California, Fourth Appellate District, the decision of the District Court of Appeal became final and the last word of the courts of the State of California.

POINT C.

Respondent at the Time of the Commencement of This Action Was a Resident of California With the Consent of the Petitioner.

Paragraph XII of the Findings of Fact and Conclusions of Law of the Superior Court of the State of California, in and for the County of Orange, reads as follows:

> "The court further finds that on or about August 10, 1939, the parties entered into a separation agreement in writing, duly executed and delivered by each party to the other, which separation agreement was duly amended by the parties on August 28, 1939. That in said separation agreement, as amended, the defendant consented that the plaintiff acquire a separate home and legal domicile, together with her child, Maria Angela, in the State of California, in the United States of America. That pursuant to said consent given in said separation agreement, as amended, the plaintiff did, on or about the 15th day of January, 1940, come to the State of California for the purpose and with the intent of making it her legal domicile and place of residence and the domicile and place of residence of her child, Maria Angela. That plaintiff and her child, on or about said date, did make and ever since have made the State of California their legal place of domicile and residence, and are now domiciled and residing in the State of California."

This finding was in response to the allegation of paragraph VII of the complaint which reads as follows:

> "On or about the 15th day of January, 1940, with the consent of the defendant, plaintiff came to the State of California and has resided in said state ever since."

Answer to Point One of Petitioner's Brief.

In the California Civil Code all actions involving *either annulment or divorce* are to be found in Chapter II of Title 1 of Part 3 of Division 1 of the Civil Code of California under the title "Divorce." Section 82 of the Civil Code gives the grounds upon which a marriage may be annulled, and subdivision Four provides:

> "That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife."
>
> Section 82 Civil Code, Subdivision Four.

A marriage status therefore was created by the marriage of petitioner and respondent. The marriage status would have continued to exist if the other party, after obtaining full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife. The contract, under the California law became valid and created a status, and the contract was not void but only voidable. As the District Court of Appeal of the State of California so succinctly stated in the case at bar "in such a case the very purpose of the action is to end an existing status which would otherwise continue, rather than to declare that no such status ever existed." The case is far different than if either of the parties to the marriage had an existing marriage undissolved, in force with a former husband or wife because in that case the marriage would be absolutely void from the beginning. It is generally acknowledged in California that an annulment, like a divorce action, concerns the *marriage status* of the parties. *Bishop* states:

> "A suit to declare a marriage void from the beginning concerns the marriage status precisely like one

to break the marriage bond for a post nuptial *delictum*. Therefore it may be and should be carried on in the courts of the domicile."

Bishop on Marriage, Divorce and Separation, par. 73.

Of late years, practically all the courts and all the text writers have adopted Bishop's self-evident statement—that is, *that in an annulment suit, the court is dealing with a marital status.*

Restatement of Law, Conflict of Laws, Sec. 115;

18 *Cal. Law Review,* p. 105;

14 *So. Cal. Law Review,* p. 70.

The status of a person domiciled in a state is a matter *in rem* and the court of said domicile has jurisdiction to determine that status.

Delanoy v. Delanoy, 216 Cal. 27, 32.

California courts have consistently held that an annulment action involves a question of the marriage status of the parties.

In *Linebaugh v. Linebaugh,* 137 Cal. 26, at 27, in an action to annul a marriage upon the ground that the plaintiff's consent was obtained by duress, threats, and intimidation, the court stated:

". . . 'Marriage' means, generally a certain existing relation or *status* and 'a marriage' can mean nothing more than this same *status* as existing between two particular persons. Section 82 assumes that the married relation exists between the parties to the action, and that this relation may be annulled when the consent of either party was obtained by force,

'unless such party afterwards freely cohabited with the other as husband or wife.' It clearly contemplates that such marriage is not absolutely void, but only voidable at the instance of the aggrieved party, who may have it annulled by a decree of court. The section would be idle and vain if it proposed merely to annul a nullity."

Linebaugh v. Linebaugh, 137 Cal. 26, 27.

In *Estate of Eichoff,* 101 Cal. 600, at 605, the court stated:

"The decree annulling the marriage was a judicial determination of the *status* of the parties thereto. It did not render the marriage void, but simply declared that it had been void, and the marriage thereby annulled is to be regarded as never having, in fact, existed, except in so far as was necessary to protect the civil rights that others may have acquired in reliance upon its apparent validity."

Estate of Eichoff, 101 Cal. 600, 605.

In *Marshall v. Marshall,* 212 Cal. 736, 739, an action in which the plaintiff sought to annul the marriage for fraud, the court pointed out that a marriage contract differed from an ordinary contract, stating:

"It creates a status which society is interested in maintaining."

Marshall v. Marshall, 212 Cal. 736, 739.

The most recent California case before the case at bar adopted a similar view. It is the case of *Bing Gee v. Chan Lai Yung Gee,* 89 A. C. A. 1030, also decided by the District Court of Appeal, February 2, 1949. To the same effect, *Piper v. Piper,* 46 Wash. 671 (91 Pac. 189).

It is interesting to note that in California there is no statute specifically providing for publication of summons in either cases of divorce or annulment, but *publication of summons is provided by general law* in Section 412 of the Code of Civil Procedure for all nonresident defendants and this has been applied as applicable to all cases of divorce and in the later cases of annulment where the contract of marriage is merely voidable and not void.

Bing Gee v. Chan Lai Yung Gee, 89 A. C. A. 1030.

Answer to Point Two of Petitioner's Brief.

This point, we believe, is fully answered in our Point A of this brief. We did not desire to argue this matter as an answer to Point Two because the statement of the matter involved in the petition did not call the attention of this court to the fact that before the entry of any default, petitioner had specially appeared in said action to move to quash the service of summons and *his motion had been denied, and no appeal had been taken therefrom;* that therefore the ruling of the Superior Court was *res judicata* as to petitioner.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522 (51 Sup. Ct. 517, 75 L. Ed. 1222).

Answer to Point Three of Petitioner's Brief.

We submit that our answer to this point is fully contained in our answer to Point One and that this point is in effect merely a restatement of the particulars involved in petitioner's Point One. We, however, desire to call to this Honorable Court's attention the fact that in none of the pleadings or proceedings has petitioner ever claimed any property rights, and we desire further to call this

Honorable Court's attention to Section 1408 of the Probate Code of the State of California, as follows:

> "Rights as between parents. As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."
>
> Probate Code of the State of California, Section 1408.

Answer to Point Four of Petitioner's Brief.

Again we must call attention to the fact that the question propounded in petitioner's Point Four and petitioner's Point One are identical and that our answer to Point One is a complete answer to Point Four. Petitioner has never contended and cannot contend that he did not receive a true and correct copy of summons and complaint in the action filed against him prior to the time he employed California counsel to appear in the Superior Court of Orange County to move to quash the service of said summons and complaint. He was fully and completely advised of all of its contents and elected to permit the default judgment to become final without taking an appeal therefrom which was open to him without submitting himself to the general jurisdiction of the court.

Answer to Point Five of Petitioner's Brief.

We respectfully call to the court's attention that this point, although known to the petitioner, has not been raised in any former steps of this proceeding.

(a) It was not made one of the grounds for the motion to quash service of summons.

(b) It was not made one of the grounds for the motion to set aside default.

(c) It was not made one of the grounds on appeal to sustain the action of the Superior Court in setting aside the default.

(d) It was not one of the grounds for a petition for hearing in the Supreme Court of California.

For the first time it is raised in a petition to this court for a writ of certiorari. It appears to us to be an afterthought. The affidavit set forth on page 25 of petitioner's brief is not a part of the judgment roll. It is an affidavit required by the Soldiers' and Sailors' Relief Act. The applicable portion of Section 670 of the Code of Civil Procedure of the State of California reads as follows:

> "(Judgment roll; Papers constituting roll.) In superior courts and municipal courts the following papers, without being attached together, shall constitute the judgment roll:
>
> 1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;

> if defendant has appeared by demurrer, and such demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of such service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons; . . ."
>
> Section 670 Code of Civil Procedure, Subsection 1.

The affidavit here quoted is simply the affidavit required by the clerk before the judgment would be entered, to show that the defendant "is not now in the military service of the United States of America."

The fact also appears that neither at the time of the commencement of the action nor at any time subsequent thereto was the petitioner a member of the diplomatic or consular service of Italy with location or duty in the United States of America.

Finally, it would seem *Ohio ex rel Popovici v. Agler*, 280 U. S. 379, is a complete answer to this claim of petitioner.

Conclusion.

Wherefore, respondent prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

W. I. GILBERT, JR.,
Counsel for Respondent,

BAUDER, GILBERT, THOMPSON,
KELLY & VEATCH,
FORGY, REINHAUS & FORGY,
Of Counsel.